FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 183

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

Appellant,

vs.

FRANK W. WEBSTER, COMMISSIONER OF HIGHWAYS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

FITZGERALD HALL,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statement of the case	2
Federal statutes sustaining jurisdiction	6
Tennessee statutes the validity of which is here involved	8
Date of judgment sought to be reviewed and the date upon which application for appeal was presented	11
Nature of the case and rulings of the court below	11
Facts relied on	13
Principles of law relied on	19
Procedure adopted to raise the Federal question	22

Table of Cases Cited.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398	6, 23
Nashville, Chattanooga & St. Louis Railway v. Wallace, 288 U. S. 249	8, 23
Nashville, Chattanooga & St. Louis Railway v. White, 278 U. S. 456	6
Roche v. McDonald, 275 U. S. 449	8
Silver v. Silver, 280 U. S. 117	23
Western & Atlantic Railroad v. Henderson, 279 U. S. 639	6
Whitney v. California, 274 U. S. 357	23

Statutes Cited.

Code of Tennessee for 1932, Sections 8835-8847	6
Constitution of the United States, 14th Amendment	20
Judicial Code, Section 237a, as amended by the Act of February 13, 1925 (28 U. S. C. A. 344)	6
Judicial Code, Section 237c, as amended by the Act of February 13, 1925 (28 U. S. C. A. 344)	8
Public Acts of Tennessee of 1921, Chapter 132, as amended (brought forward into the 1932 Code of Tennessee as Sections 2638, et seq.)	2, 8, 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 183

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

Appellant,

vs.

FRANK W. WEBSTER (SUBSTITUTED FOR R. H. BAKER), ET AL.

Appellees.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT BY APPELLANT TO COMPLY WITH RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

This is a suit filed in the Chancery Court of Davidson County, Tennessee, to have determined the constitutional validity of certain Tennessee statutes, to-wit:

Chapter 132 of the 1921 Public Acts of Tennessee, as amended (brought forward into the 1932 Code of Tennessee

as Sections 2638 *et seq.*), authorizing the Commissioner of Highways of the State of Tennessee to require railroads to pay directly one-half the cost of grade separation projects on State aid roads. The only questions involved are Federal ones and the Supreme Court of Tennessee has determined those questions contrary to the claims of appellant Railway. The ultimate constitutional question is whether the rules of law relative to the cost of grade crossing elimination which became crystallized in "horse and buggy" days have changed to respond to the different requirements of the "motor age." *Today trains need protection from motorists, rather than motorists from trains.*

The facts and proceedings resulting in this appeal are as follows:

1. The Federal Government, by appropriate statutes and administrative action, is directing and helping finance the construction of a nation-wide system of super-roads in the interest of commerce by motor vehicles. One of these projects involved a new road east and west across Tennessee, in addition to three existing routes, running roughly from Nashville, *via* Centreville, Linden, Perryville, Lexington, and Jackson to Memphis.

From a point near Perryville on the Tennessee River to Lexington an entirely new road (new Route 20) was built, crossing the main line of the Railway, within the corporate limits of Lexington, at a point where there had never been a public road.

The Federal Government refused to grant Federal aid to this project unless appellant Railway's tracks at this point were crossed by an underpass, so the Tennessee authorities relying on Chapter 132 of the 1921 Public Acts of Tennessee, as amended, ordered the Railway to separate this grade in accordance with plans approved by the Federal Government and to pay directly one-half the cost of the

grade separation project. No bus or truck company or any other citizen was ordered to contribute.

2. Appellant Railway, being advised that it was under no obligation to comply with said order, filed a bill in the Chancery Court at Nashville, challenging the validity of the order and the constitutionality of the statutes on which it was based under a statement of facts which are set forth in the bill of complaint.

An answer was filed and proof taken. The lower court, with one minor exception to be noted later, found that the testimony fully supported every averment of fact in the bill; held the challenged statutes to be unconstitutional, the order based thereon to be void, and made an appropriate order consistent with the finding of facts. The findings and a part of the order of the trial court follow:

> "3. The Railway in its bill of complaint suggested that the statutes in question were not applicable, as the existing grade crossing in question at Lexington was not being eliminated and that, therefore, under a strict, technical reading of the law were not applicable to such a case as this. That point was not stressed at the hearing or in the briefs to any material extent. The court is of the opinion that these statutes are applicable to such a situation as is involved in this case.
>
> "4. It was alleged in the petition, particularly in paragraph (e) of Section XVIII, that the construction of this underpass was unnecessary. The court finds from the evidence that there are no facts to sustain this averment and that in the interest of commerce by motor vehicle on the public highways, this was a proper engineering project, properly conceived, located, designed and constructed. As an engineering and economic project it was perfectly sound. The court further finds that the cost of such underpass, the same being estimated at Seventeen Thousand Four Hundred ($17,400.00) Dollars is not unreasonable or ex-

cessive. However, the court finds that this underpass did not involve an exercise of the police power any more than many other features of this project, such as the elimination of curves, grades, widening the pavement et cetera.

"5. The bill of complaint sets out very elaborately, directly and also through incorporation of numerous exhibits, a detailed state of facts on which complainant Railway relies to support its challenge to the constitutional validity of the Tennessee acts under attack. Except in the one particular just referred to in the immediately preceding paragraph of this memorandum opinion, the court finds that the testimony fully supports all such averments of fact. There can be no doubt under the testimony that this underpass is a part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways, the result of which is to afford competition with railroads and that the decision to build this underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves. All of the detailed facts and the ultimate conclusions as set out in the bill of complaint are, as aforesaid, fully supported by the testimony with the one exception above noted. The court, therefore, finds as a fact, with the one noted exception, that the facts relied upon as rendering the statute unconstitutional are all as alleged in said original bill as amended.

"6. The bill of complaint did not challenge the validity of the Tennessee statutes in question under all conditions but it was frankly admitted in the brief and the argument that they might be valid under certain

situations. The challenge here was only when there exists such a situation as presented by the bill of complaint and the testimony. The court is of the opinion that the challenge to the validity of these statutes, under these particular conditions, on the several grounds set out in the bill of complaint, is sound and that said statutes are, under such conditions, in violation of both the Constitutions of the State of Tennessee and of the United States and that the order of the Highway Commissioner of Tennessee supposedly made pursuant to those statutes is also invalid on that account; and that the demand for the payment of money by the Railway towards the cost of this project is without warrant in law and should be permanently enjoined.

"It is, therefore, ordered, adjudged and decreed that Chapter 132 of the 1921 Public Acts of Tennessee, as amended, be and it hereby is declared null and void, as being in violation of the Constitution of the State of Tennessee and of the United States, in so far as applicable to such a state of facts as set out in the bill of complaint as amended and as disclosed by the evidence" (R. 733-736).

3. The State officials, respondents in the trial court (appellees here), perfected their appeal directly to the Supreme Court of Tennessee, as there were no questions involved other than constitutional ones.

4. No challenge was made in the Supreme Court of Tennessee by either party to the findings of fact in the lower court, so that in essence the case was there as if the bill had been demurred to.

5. The Supreme Court of Tennessee, in its final opinion and order of May 19, 1934 (R. 739-756), did not disturb the findings of fact as made by the lower court. By stipulation on this appeal the parties have agreed that practically all the averments of fact set out in the original bill of com-

plaint are true (R. 1-7); however, the Supreme Court of Tennessee held that the conclusions of law reached by the Chancellor below were unsound, held the challenged statutes to be consistent with the Federal Constitution and reversed the judgment of the lower court. This was a final judgment by the highest court of Tennessee, and from that judgment appellant Railway has seasonably perfected its appeal to the Supreme Court of the United States.

A.

Federal Statutes Sustaining Jurisdiction.

The judgment sought to be reversed is a final one by the highest court in Tennessee, wherein appellant specifically challenged, in proper manner, the validity of certain Tennessee statutes on the ground that they violated the Federal Constitution. The Supreme Court of Tennessee expressly held these state statutes to be consistent with the Federal Constitution (R. 739-756).

(a) Jurisdiction of the Supreme Court of the United States to review this cause is provided for by Section 237 (a) of the Judicial Code as amended by the act of February 13, 1925 (28 U. S. C. A. Section 344). The following cases seem clearly to support the claim of jurisdiction:

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398;

Western & Atlantic Railroad v. *Henderson*, 279 U. S. 639;

Nashville, Chattanooga & St. Louis Railway v. *White*, 278 U. S. 456.

(b) This suit was brought under the Tennessee Declaratory Judgments Act, Sections 8835-8847 of the 1932 Code of Tennessee. The State had called, formally, upon appel-

lant Railway to pay to it a substantial sum of money. To avoid this payment was the object of the suit. The decree of the lower court was in part as follows:

> "It is further ordered, adjudged and decreed that the order of the Commissioner of Highways, based upon said statutes, directing complainant to pay one half the cost of the underpass in question is null and void, being based on no valid statute.
>
> It is further ordered, adjudged and decreed that the amount of money demanded of The Nashville, Chattanooga & St. Louis Railway is not legally due and the order demanding payment is null and void and the present Commissioner of Highways of the State of Tennessee, his successors in office and authority, and other interested public officials are hereby enjoined from undertaking directly or indirectly to force payment from complainant Railway of this sum of money or any other sum by reason of the construction of the underpass in question located on Route No. 20 within the corporate limits of Lexington, Tennessee, where it crosses complainant's main line; and that the entire cost of this project be borne by the Tennessee State Highway Commission, except for contributions by the Federal Government; and the said Commission shall pay to the complainant as provided in the contract (Exhibit No. 4 to the bill) between the State Highway Commission and complainant, dated October 20, 1931, the sums therein provided for" (R. 736-737).

This suit did not involve an academic question. The State of Tennessee had formally called on appellant Railway to pay a definite sum of money. The object of the suit was to have determined the liability of the Railway to pay. It will be noted that the decree of the trial court not only held that the Railway did not owe the money claimed, *but actually enjoined the appropriate public officials from endeavoring to collect the disputed sum.*

The right and power of the Supreme Court of the United States to review the judgment of the Supreme Court of Tennessee, under the particular statute involved, under conditions such as obtain in this case, was expressly decided by this Court in the case of *N. C. & St. L. Ry.* v. *Wallace, Comptroller,* 288 U. S. 249.

(c) If for any reason appeal should not be considered the appropriate procedure, then appellant respectfully requests that its appeal be considered as an application for a writ of certiorari, as authorized by paragraph (c) of said Section 237 of the Judicial Code (28 U. S. C. A. Section 344). Also see:

Roche v. *McDonald,* 275 U. S. 449.

B.

Tennessee Statutes the Validity of Which is Here Involved.

The Tennessee statutes, the validity of which, under the Federal Constitution, is the only question in this cause, are Chapter 132 of the 1921 Public Acts of Tennessee, as amended (the same being set out in full as Exhibit No. 2 to the original bill, commencing on page 56-64 of the record certified to the Supreme Court of the United States). The important section is No. 2 (which has been brought forward into the new 1932 Code of Tennessee as Section 2640) and is in words and figures as follows:

> "When any such grade crossing shall be ordered to be eliminated as provided, it shall be the duty of the railroad company owning or operating the track at such crossing to comply with the order of the commissioner of said department within the time specified in such order by preparing and submitting to the commissioner for approval detailed plans and specifications and estimates of cost for the construction of such underpass or overpass and by the construction of said

overpass or underpass in accordance with the plans and specifications so approved, including the necessary approaches thereto, provided

(a) that any such railroad company shall have the right to appeal to the railroad and public utilities commission for an extension of time within which to begin and complete the actual construction of the underpass or overpass required by such order of the commissioner, and said railroad and public utilities commission is empowered to stay the order of the said commissioner for such actual construction for any length of time not exceeding two years, whenever it shall find from evidence submitted to it that said stay or extension of time is necessary on account of the financial condition of the railroad company affected, or that such company is entitled to said stay or extension of time in order to equitably protect the financial interests of such company; (b) that the detailed plans and specifications and estimates of costs for any such overpass or underpass ordered by the commissioner may be prepared in the discretion of the commissioner by the department's own engineers, or by engineers employed for the purpose, in which event said plans and specifications and estimates of cost shall be subject to the approval of the railroad company affected; (c) that if any such railroad company shall, in obedience to the direction of said commissioner make surveys and prepare estimates and plans, then said commissioner shall within a reasonable time, not exceeding six months, reimburse such railroad or railway for one-half of the expense and cost of such work; and if, after the making and preparation of any such surveys, plans, and estimates of cost by any railroad company under the orders of the commissioner, or any part thereof, the order for the elimination of the grade crossing be revoked by the commissioner, and the elimination of such crossing abandoned, the commissioner shall, within a reasonable time, not exceeding six months from the date of said revocation, reimburse the railroad or railway company for all the actual expense and

cost of such work incurred by said company, upon a presentation of an itemized and sworn statement of said expense and cost, the amount thereof to be included as a part of the cost of the highway of which such crossing is a part; (d) before any railroad company shall be obligated or required to commence and prosecute the actual and physical work of separating any such grade crossing, the said commissioner shall have available sufficient funds with which to reimburse said railroad company for that part of the expenses of said separation which is to be paid out of the public funds under the provisions of this statute; and the commissioner shall make the railroad company, prosecuting said work, monthly payments in an amount which shall equal the proportion of the cost and expense which the public is required to pay under the provisions of this statute of all that part of the work, including both labor and materials, completed at the date of any said monthly payment; (e) that when any grade crossing covered by sections 2638 and 2639 shall have been ordered to be eliminated, as provided, it shall be the duty of the railroad company upon which such order of the state highway department may have been served, in accordance with the provisions of this statute, at once to comply with such order, or avail itself of the right of an appeal, as set forth in subsection (a) of this section, within sixty days from the date of the service of said order, and in the event any such railroad company should fail to comply with such order directing the elimination of such grade crossing, or to appeal within sixty days, the state highway commissioner shall have the authority to proceed immediately with the construction of such grade crossing separation, *and upon the completion of same to assess one-half of the cost of preparation of plans and estimates and one-half of the cost of the work of construction against the railroad company affected thereby*, and all such costs as are assessed in this manner against such railroad company shall be a lien upon the physical properties of such railroad company, which

> lien shall be prior to any lien then existing against such physical properties, and the amount of such cost may be recovered against such railroad company by a suit brought on behalf of the state by its attorney-general, and the enforcement, in the name of the state, of the lien."

We have emphasized, for the convenience of the Court, the vital words imposing the obligation to pay which is being resisted in this cause.

C.

Date of Judgment Sought to be Reviewed and the Date Upon Which Application for Appeal Was Presented.

The final judgment in the Supreme Court of Tennessee, which appellant seeks to have reviewed in this cause, was entered May 19, 1934 (R. 756). The application for appeal to the United States Supreme Court was presented to the Chief Justice of the Supreme Court of Tennessee and allowed on June 28, 1934.

D.

Nature of the Case and Rulings of the Court Below.

Said Tennessee statutes, to wit: Chapter 132 of the 1921 Public Acts of Tennessee, as amended, authorized state officials to require railroads alone, of all citizens, to pay directly one-half the cost of grade separation projects on the state highway system. In 1921 this was a progressive step and possibly these statutes were valid as of that time. *The claim here is that conditions have so vitally changed that under the facts of this particular case these state statutes are no longer consistent with the Federal Constitution.*

Briefly, the pleadings and evidence show that the Federal and State Governments were cooperating in planning a

new, and fourth, through highway east and west across Tennessee for the deliberate purpose of fostering commerce by motor vehicle, primarily interstate. When this new road reached appellant Railway's tracks, within the municipal limits of the little west Tennessee town of Lexington, the question arose as to how the crossing should be made. The Federal Government, through appropriate officials, declined to contribute Federal aid unless the crossing was made other than at grade, so the order to separate this grade crossing involved in this cause was made. It was the result, exclusively, of engineering judgment and motor traffic considerations—and the desire for Federal aid. No question of safety was considered by either State or Federal officials, except in the abstract. *No State or Federal official ever knew, even after this suit was brought, the number of trains appellant Railway operated over the portion of the track in question or the hours at which they ran.* The answer in the trial court so admits (R. 83-84).

The theory of the Railway, which the testimony fully supports, is that this whole project was a part of a nation-wide plan to foster commerce by motor vehicle by building, through joint Federal and State action, great through highways clear across the country. For local travel the character of road here involved was an economic monstrosity. This new road from Nashville to Lexington, where the underpass is, *via* Linden is of the most modern type, built under Federal standards, at enormous cost, traverses the poorest sort of country which is very thinly populated and productive of substantially no traffic of any kind. *It would take the purchase price of* 9,000 *acres of the average adjacent land to pay for each mile of this super-highway* (R. 313).

The answer of the Tennessee public officials, appellees here, and their testimony are conclusive evidence that the location and construction of this underpass was determined

by engineering and motor traffic considerations precisely as the determination of alignment, grade, width and thickness of pavement and the like (R. 84-85, 102-103). The lower court so found (R. 731-737). That finding was not challenged (R. 738). Appellant Railway's theory is that what was done was not in the exercise of the police power in any proper sense but the exercise of the sovereign powers of the Federal Government and the State of Tennessee to lay out, build and construct public highways.

The Railway went further and showed in infinite detail, about which there is no dispute, the revolution in transportation, due to the advent of internal combustion engines and construction of a nation-wide system of public roads. Briefly, the following appears without contradiction:

Facts Relied On.

1. Eliminating municipal streets, there are now more than 3,000,000 miles of public roads in America, of which approximately 10 per cent are part of state highway systems and 6.5 per cent part of the Federal aid system. In Tennessee there are about 70,000 miles of public roads, outside of municipalities, of which approximately 7,000 belong to the technical state highway system and about 3,500 are Federal aid roads. It is undisputed that the road and underpass in question is a part of both a Federal and state highway project.

2. This gigantic road building program is costing the American taxpayers an average of nearly $2,000,000,000.00 a year, to which Tennessee's taxpayers have contributed in the last several years approximately $250,000,000.00.

3. The funds for this road-building program have been obtained largely from borrowed money and gen-

eral taxes. Special motor vehicle taxes and gasoline taxes pay less than one-half the cost of construction and maintenance.

4. Practically no part of motor vehicle taxes, including the gasoline tax, goes to support the schools and operations of government, but are expended almost entirely on facilities which motor vehicles use in the transportation business. On the other hand a large part of railroad taxes goes directly to the support of public roads and no part of their taxes goes to the construction and maintenance of facilities for them to use in the transportation business.

5. The policy of the Federal Government, wherein the several States cooperate, as evidenced by various acts of Congress, is to construct a nation-wide system of highways, interstate in character. On all Federal aid roads the government is the dictator.

6. Over these 3,000,000 miles of highways swarm over 26,000,000 motor vehicles, killing an average of about 35,000 citizens a year, injuring an average of about 1,000,000, making havoc with property, and producing a condition worse than war.

7. The drivers of motor vehicles generally pay little or no attention to any laws or rules of the road and by their own negligence and criminal indifference to consequences are almost without exception the authors of their own misfortune.

8. The number of railroad grade crossing accidents are negligible in comparison with total automobile accidents so that if every grade crossing in America were separated it would prevent only 5.1 per cent of the deaths resulting from automobile accidents and less

than one-half of one per cent of the injuries resulting from their operation. New crossings are being built faster than old ones are being eliminated, although the railroads are spending directly about thirty millions annually for such purposes. Commercial motor vehicles spend nothing directly for such purposes.

9. The public highways, particularly Federal and State aid roads, are no longer constructed for or devoted primarily to local, social, or personal use but to commercial transportation just as the railroads. Motor vehicle trains comparable in size and speed to railroad trains monopolize the highways, primarily the through Federal aid roads. A third of all collisions involving train movements result from automobiles running into trains. Some of the worst railroad accidents in history have been produced by careless motorists.

Trains now need protection from their competitors doing a public transportation business by motor vehicle on the public highways. Commercial operation on the highways is a development of the last few years.

10. In Tennessee railroad operations are strictly regulated in the interest of public safety. Automobiles are substantially without regulation. The cost of grade crossing protection has been borne exclusively by the railroads. The cost of grade crossing elimination has been borne largely by the railroads. No motor vehicle operator, no transportation agency using the highways is asked or expected, under the law, to contribute a single dollar directly to grade crossing protection or elimination.

11. This vast new transportation business, in direct and successful competition with the railroads, has

taken from them about 90 per cent of their passenger business, about 75 per cent of their distributive freight and made great inroads into heavy long distance carload movements. The commercial use of the public highways is now fairly comparable to the railroad systems of the nation.

12. Traffic and transportation problems, indeed the very life of the nation, have been revolutionized by the advent of the internal combustion engine and the newly developed national highway system.

13. The modern grade crossing problem both in fact and principle is wholly different from that of thirty years ago. There are trains on the highways as well as on the railroads. Motor vehicular use of a crossing will, on the average, exceed train use by a hundred to one—frequently even more.

14. Regulation and taxation of railroads has been in effect for years. Commercial transportation on the highways is of very recent origin and, so far as interstate is wholly unregulated. All railroad taxes go to the support of the general government and none is expended on facilities for them to use. Of the taxes collected from railroads in Tennessee, practically twenty per cent goes directly to the construction of roads for their competitors to use.

The tax burden on motor vehicles, particularly those in commercial use, is negligible as compared to the burden on railroads. With negligible exceptions all motor vehicle and gasoline taxes go exclusively to construct and maintain highways and facilities for motor vehicles to use.

Due to this discrimination in taxation it only costs commercial transportation agencies by motor vehicle

on the average about seven cents of their gross revenues to obtain a highway on which to do business and receive governmental protection; whereas, it costs the railroads of the nation about twenty-eight cents and of Tennessee about thirty-three cents out of each dollar of gross revenue to obtain the same thing.

15. This new road from Nashville to Lexington is of the most modern type, built to Federal standards at exeessive cost, traversing poor country, thinly populated. It would take the purchase price of nine thousand acres of the average adjacent land to pay for each mile of this super-highway.

16. The Federal and State authorities deliberately designed this road as a through highway to accommodate new traffic and also that now moving over State Route No. 1, which is Federal Route 70. The only justification for this road is the anticipated future traffic, largely interstate.

Before this new road was constructed traffic in this territory was negligible, as will be seen from the density maps filed as Exhibit 6 to the testimony of Commissioner Baker.

17. It is the general policy of the Federal Government to force grade separations on Federal aid projects. The Federal Government, having no police power, naturally made no investigation of any facts except traffic needs and possibilities. It was the Federal Government alone that initially determined that the new Route 20 should cross the Railway's tracks by an underpass.

18. The construction of this underpass having been decided upon by Federal officials at Washington pursuant to a general plan, Tennessee officials ordered the

Railway to separate the anticipated crossing, paying directly one-half the cost without any studies as to the dangers. Not a Tennessee Highway official knew the fundamental facts, or even sought to learn them, to determine the dangers that might exist if there were a grade crossing instead of an underpass.

The underpass was dictated as a matter of engineering to meet "expected conditions," without any public official ever knowing or trying to find out how many trains went over this crossing and when.

The Tennessee authorities were primarily interested in only two things, first, in getting Federal aid, and, second, in promoting through transportation by motor vehicle.

The construction of this underpass was determined on precisely the same principles as straightening curves and reducing grades which involved an exercise of engineering skill and judgment, not of the police power.

With these facts as a basis, appellant Railway claimed that even if the construction of this underpass could be considered in any way as an exercise of the police power that, even so, to require appellant Railway alone, of all the citizens, to pay something directly to the cost of construction was arbitrary, unreasonable and discriminatory under the Fourteenth Amendment and a direct and illegal burden on interstate commerce by railroad.

Considering the objects which the Federal and State Governments had in mind, appellant Railway admits the road was properly laid out, the location of the underpass was proper and that its construction was in the interest of commerce by motor vehicle. Due to the revolution in transportation—today trains operate on public highways just as on railroad tracks—and due to an entire change in the

grade crossing problem from what it was a half century ago—appellant Railway makes the point that even under the police power it alone may not be required to contribute directly to the cost of constructing this underpass.

There are several propositions of law on which the Railway relies and stated in syllogistic form follow in order:

Principles of Law Relied On.

1. A statute may be valid at one time and not at another. It may be valid in one set of circumstances, and not in others. It may be perfectly valid on its face, yet under a given state of facts disclosed by evidence, invalid. The action of constituted authority must be judged in the light of conditions as of the time action is taken.

2. Constructing highways and making them safe for non-existent, but anticipated fast, heavy, commercial traffic is not an exercise of the police power.

3. The government of the United States, under the commerce and post roads provisions of the Federal Constitution, is vested with certain powers in connection with public roads. The Federal Government has no police power. Indeed, under the Tenth Amendment, police powers are reserved to the several states.

4. Any valid exercise of the police power requires investigation and knowledge of the facts.

5. A constitutional exercise of the police power requires investigation of the facts and action pursuant to those facts. Public welfare, as distinguished from commercial convenience, is the vital element of any constitutional exercise of the police power.

6. The difference between the engineering problems involved in making a highway safe and convenient for business thereon and a legitimate exercise of the police power is generally recognized.

7. There have been conditions in the past justifying a state, in the exercise of the police power, in requiring a railroad to separate a grade crossing at its expense. Such cases carry no weight where conditions are wholly dissimilar and commercial convenience, not public welfare, is the motivating influence of action.

8. Exercise of the police power by the several States is subject to the Fourteenth Amendment of the Federal Constitution. Arbitrary action and gross discrimination are no less arbitrary action and gross discrimination when camouflaged by an alleged exercise of the police power.

9. A State may not even in the intelligent and reasonable exercise of the police power burden interstate commerce.

10. Where a new commercial road, whether railroad or highway, crosses an old commercial road, the new one must pay the crossing cost.

11. The interpretation of the Federal Constitution is not static. It varies with the times to meet new and changed conditions.

12. The rules of law involving the apportionment of grade crossing elimination expense grew up in "horse and buggy" days. We are today living in a "motor age." The grade crossing problem has been drastically changed, both physically and economically. Railroads now need protection from motorists on the highways. Traffic on the highways is commercial precisely

as traffic on the railroads. Utterly changed conditions call for a restatement of the constitutional principles with reference to the cost of grade crossing elimination.

The Supreme Court of Tennessee in its opinion did not state accurately or fully (we say this with profound deference) the contentions of the Railway. Briefly, that court held as follows:

1. That while municipal ordinances valid when passed may become invalid, due to changed conditions, this rule is not applicable to statutes (R. 743).

2. The opinion contains the following:

> "The obvious purpose of the Acts of 1915 and 1919 was to provide a state system of highways and of the Act of 1921 to promote the safety of persons traveling the highways at grade crossings as well as to promote the safety of persons traveling the railroads at such crossings by eliminating dangerous grade crossings. That object falls clearly within the police power of the State and the power was properly exercised when the order was made upon the railroad to aid the State in eliminating the grade crossing at Lexington" (R. 755).

This conclusion of law ignored the undisputed fact—admitted in appellees' answer (R. 83-84)—that no State or Federal official ever investigated or knew the number of trains operated or the hours at which they ran. It ignored the unchallenged findings of the trial court, fully sustained by the evidence, that the determination to construct, and the actual construction of this underpass, was motivated by the same engineering and traffic considerations as controlled alignment, grades, etc. No consideration was given the proposition that even if this state action under attack could be considered an exercise of the police power, even

so, it was so arbitrary and unreasonable and discriminatory, so far as the Railway was concerned, as to violate the Fourteenth Amendment; and such a direct, unnecessary burden on interstate commerce by railroad as to violate the "commerce" clause of the Federal Constitution.

3. That whether the acts here challenged have become invalid since their enactment is a matter exclusively for the legislative branch of government.

In a word, the contention of the Railway is that the rules of law which crystallized in the "horse and buggy" days must change as transportation problems have changed in this "motor age" and that to require a railroad alone to directly participate in such a grade crossing project, as the one in the case at bar, under the undisputed facts and evidence transgresses Federal protective guarantics.

This exact question, made as we have made it, has not, so far as we can find out, been brought to this Court; nor in this exact manner to any other tribunal, save in the case at bar. It is a matter of paramount importance, growing out of new conditions under which State and Federal Governments are fostering a new system of commercial transportation in direct competition with railroads at the rate of some $2,000,000,000.00 a year.

E.

Procedure Adopted to Raise the Federal Question.

Appellant Railway was the complainant in the trial court below and filed the bill involved in this cause to enjoin the enforcement of the order directing it to pay the State money and this of necessity raised the constitutional question as to the validity of the Tennessee statutes which were the predicate for the order to pay. Both Tennessee courts expressly passed on the Federal Constitutional questions, the trial court holding with the Railway (R. 731-736) and

the Supreme Court of Tennessee holding otherwise (R. 739-756).

The procedure adopted was the usual and proper method, under the practice in Tennessee, to have determined these Federal questions. It would seem that appellant has adopted the proper procedure to have this Court consider and determine the Federal constitutional questions raised. See:

Nashville, Chattanooga & St. Louis Railway v. *Wallace*, 288 U. S. 249;

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398;

Silver v. *Silver*, 280 U. S. 117;

Whitney v. *California*, 274 U. S. 357, 360.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this cause on appeal and that the Federal questions involved are new, substantial and important. With the growing appropriations by the Federal Government for the construction of an interstate system of highways running into the hundreds of millions of dollars a year and the continued expenditures by the several States for the creation of a transportation system competitive with railroads, the propositions of law here advanced would seem to be of paramount importance. A brief on the merits will be filed later.

Copy of this statement has been served upon adversary counsel in the manner provided by the Rules of the United States Supreme Court.

Respectfully submitted,

FITZGERALD HALL,
Counsel for Appellant Railway.

June 28, 1934.